

June 16, 1982

BY MESSENGER

Robert D. Hadl
Universal City Studios, Inc.
100 Universal City Plaza
Universal City, California 91608

Re: "Donkey Kong"

Dear Bob:

As we discussed, I enclose the last version of the Complaint which I prepared concerning "Donkey Kong". Please note, however, that Count II is probably permitted only in the Ninth Circuit (c.f. Stauffer v. Exley, 184 F.2d 962) -- not in the Second Circuit (c.f. La Societe Anonyme etc. v. Jean Patou, 495 F.2d 1265). Also, Count III still refers to California law and obviously must be changed since the action is now being filed in New York.

I also enclose some documents which I secured from a case filed by Nintendo in the Federal Court for the Western District of Washington. I have not reviewed the enclosures. However, your New York lawyer may find useful information contained in the documents, and it is for that reason that I send them to you.

Please call if you have any questions.

Best regards.

Very truly yours,

STEPHEN A. KROFT

SAK:jw
Enclosures (as indicated)

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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF NEW YORK
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11 UNIVERSAL CITY STUDIOS, INC., a) NO.
12 corporation,)
13) COMPLAINT FOR VIOLATION
14 Plaintiff,) OF UNITED STATES TRADEMARK
15) LAWS AND UNFAIR COMPETITION
16 vs.)
17 NINTENDO CO., LTD., a corporation,)
18 and NINTENDO CORPORATION OF)
19 AMERICA, INC., a corporation,)
20 Defendants.)
21

22 Plaintiff complains and alleges as follows:
23

24 JURISDICTION

25 1. This is an action for violation of the trademark
26 laws of the United States (15 U.S.C. §§1121, 1125(a) and 1126) and
27 the California statutory and common law of unfair competition.
28 Jurisdiction over Count I is conferred by virtue of Title 15,
U.S.C. §§1121, 1125(a) and Title 28, U.S.C. 1338(a). Jurisdiction
over Count II is conferred by virtue of Title 15, U.S.C. §§1121,
1126 and Title 28, U.S.C. §1338(a). Jurisdiction over Count III
is conferred by virtue of Title 28, U.S.C. §1338(b) and by the

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1 doctrine of pendent jurisdiction, such counts being claims arising
2 out of substantially the same facts as Counts I and II.

3 THE PARTIES

4 2. Plaintiff is now and at all times mentioned herein
5 was a corporation duly organized and existing under and by virtue
6 of the laws of the State of Delaware and qualified to do business
7 in the State of New York, with an office located in the Southern
8 District of New York.

9 3. RKO General, Inc. ("RKO") is now and at all times
10 mentioned herein was a corporation duly organized and existing
11 under and by virtue of the laws of the State of Delaware and
12 qualified to do business in the State of New York, with its prin-
13 cipal place of business located in the Southern District of New
14 York. RKO is not a party to this action. Plaintiff has acquired
15 from RKO by written assignment all claims which RKO might have
16 against defendants based on or arising out of the matters alleged
17 in this Complaint.

18 4. Plaintiff is informed and believes and therefore
19 alleges that defendant Nintendo Co., Ltd. ("Nintendo") is now and
20 at all times mentioned herein was a corporation duly organized and
21 existing under the laws of the Country of Japan and is and at all
22 times mentioned herein was transacting business in the State of
23 New York in the Southern District.

24 5. Plaintiff is informed and believes and therefore
25 alleges that defendant Nintendo Corporation of America, Inc.
26 ("Nintendo America") is now and at all times mentioned herein was
27 a corporation duly organized and existing under the laws of the
28 State of New York or some other state and qualified to do business

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1 and doing business in the State of New York, with its principal
2 place of business located in the Southern District of New York.
3 Nintendo America is a wholly owned subsidiary of Nintendo.

4 COUNT I

5 (Violation of 15 U.S.C. §1125(a))

6 6. Plaintiff hereby refers to paragraphs 1 through 5,
7 inclusive, hereinabove, and incorporate them, each and all, herein
8 by this reference as though set forth in full.

9 7. Prior to 1933, Merian C. Cooper created the name,
10 character and story "King Kong". In 1933, RKO Radio Pictures, Inc.
11 ("RKO Pictures") completed production of and released, under written
12 license from Merian C. Cooper (the "1932 license"), a motion picture
13 version of the "King Kong" story entitled "King Kong" and featuring
14 the character "King Kong" a.k.a. "Kong" (hereinafter "King Kong
15 motion picture"). Pursuant to the foregoing written license,
16 Merian C. Cooper retained all merchandising and ancillary rights in
17 the name, character and story "King Kong".

18 8. RKO is the successor in interest to all rights of
19 RKO Pictures in and to the name, character, story and motion picture
20 "King Kong." Plaintiff is the successor in interest, under written
21 agreement, to all of the rights of Merian C. Cooper and his heirs
22 (except book publishing rights) in and to the name, character and
23 story "King Kong."

24 9. The motion picture "King Kong" has been advertised,
25 exploited, promoted, distributed and exhibited by RKO Pictures and
26 RKO continuously for the past 49 years and has achieved, and pres-
27 ently enjoys, enormous nationwide popularity and commercial success.
28 In addition, during most of such period, including at least the last

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1 30 years, RKO Pictures and RKO, on behalf of and for the benefit of
2 Merian C. Cooper and his heirs and plaintiff have, under the 1932
3 license, continuously exploited and licensed the "King Kong" name,
4 character and story for use in association with motion pictures,
5 television shows and a wide variety of consumer products including
6 various toys and games. Many of these products have been exten-
7 sively advertised.

8 10. As a result of the extraordinary popularity and com-
9 mercial success of the "King Kong" motion picture and the additional
10 motion pictures, television shows and consumer products licensed by
11 RKO Pictures and RKO, and the extensive advertising and promotion
12 undertaken in connection therewith, the "King Kong" name, character
13 and story have become, and are, widely and well known to the public,
14 and are associated and identified by the public with their creators
15 and owners. Accordingly, the name, character and story "King Kong"
16 have acquired a secondary meaning in connection with motion pictures,
17 television shows, entertainment, video and consumer products, all of
18 which are identified with a single origin and source.

19 11. Plaintiff is informed and believes and therefore
20 alleges that defendants have manufactured, advertised, distributed
21 and sold in the United States in interstate commerce a coin oper-
22 ated video game entitled "Donkey Kong" which incorporates, uses,
23 copies and features the "King Kong" name, character and story.
24 Plaintiff is further informed and believes and therefore alleges
25 that defendants have licensed and designed, and in the future
26 intend to license, manufacture, advertise, distribute and sell,
27 home video games and cassettes entitled "Donkey Kong" which in-
28 corporate, use, copy and feature the "King Kong" name, character

1 and story.

2 12. The foregoing conduct of defendants was, and is,
3 without the consent of either plaintiff or its predecessors.

4 13. Plaintiff has given formal notice to defendants, and
5 each of them, of plaintiffs' rights and has demanded that defen-
6 dants cease and desist from their use of the "King Kong" name,
7 character and story in violation of plaintiff's rights. Defendants
8 have refused to so cease and desist. Defendants have continued to
9 engage in the foregoing conduct with actual knowledge of plaintiff's
10 rights, and with the intent to cause confusion and mistake among
11 the public.

12 14. By engaging in the aforesaid acts and conduct,
13 defendants, and each of them, have misled the public and have
14 caused public confusion and are likely to continue to cause public
15 confusion and to cause public mistake and to deceive and mislead
16 and confuse the public into believing that "Donkey Kong" originates
17 with or is sponsored by, authorized by or connected with plaintiff
18 or a party acting on its behalf or for its benefit.

19 15. By the foregoing acts, defendants, and each of them,
20 have used false designations of origin and false descriptions and
21 representations in connection with the advertisement, sale and
22 distribution of goods in interstate commerce in violation of 15
23 U.S.C. §1125(a).

24 16. As a direct and proximate result of the foregoing
25 acts and conduct of defendants, and each of them, plaintiff has
26 been damaged in an amount which is currently unascertained, but
27 which plaintiff is informed and believes exceeds \$1,000,000.
28 Plaintiff will seek leave to amend this Complaint to allege the

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1 amount of such damages when the same has been ascertained.

2 17. Plaintiff is informed and believes and therefore
3 alleges that defendants, and each of them, have derived and re-
4 ceived substantial profits from the foregoing wrongful acts and
5 conduct. Plaintiff is unaware of the exact amount of such profits
6 derived and received by defendants. As a result of the foregoing,
7 defendants, and each of them, have been unjustly enriched at the
8 expense of plaintiff, and plaintiff is entitled to an accounting of
9 all profits derived by defendants, and each of them, from the acts
10 and conduct of defendants as aforesaid.

11 18. Plaintiff is informed and believes and therefore
12 alleges that in engaging in the aforesaid conduct and doing the
13 aforesaid acts defendants acted wilfully, wantonly, maliciously,
14 oppressively and with wanton and wilful disregard of plaintiff's
15 rights and, accordingly, plaintiff is entitled under the circum-
16 stances to three times the amount of its damages proved at trial
17 and, in addition, to punitive and exemplary damages in an amount
18 not less than \$5,000,000.

19 19. Defendants, and each of them, threaten and continue
20 to threaten to engage in the acts and conduct set forth hereinabove
21 unless restrained and enjoined by this Court from doing so.

22 20. The acts, conduct and threatened acts and conduct of
23 defendants, and each of them, as hereinabove allged, have caused
24 and are causing, and will continue to cause plaintiff great and
25 irreparable injury, loss and damage which cannot be adequately
26 compensated or measured in money and for which plaintiff has no
27 adequate remedy at law.

28 21. This is an extraordinary case, and plaintiff is

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1 therefore entitled to recover its attorneys' fees and legal expenses
2 incurred in bringing and prosecuting this action.

3 COUNT II

4 (Federal Unfair Competition)

5 22. Plaintiff hereby refers to paragraphs 1 through 14
6 and 16 through 21, hereinabove, and incorporates them, each and
7 all, herein by this reference as though set forth in full.

8 23. The aforesaid acts and conduct of defendants, and
9 each of them, constitute unfair competition in violation of 15
10 U.S.C. §§1126(b), (g), (h) and (i), and defendants are liable to
11 plaintiff therefor.

12 COUNT III

13 (State Law Unfair Competition)

14 24. Plaintiff hereby refers to paragraphs 1 through 14
15 and 16 through 21, hereinabove, and incorporates them, each and
16 all, herein by this reference as though set forth in full.

17 25. The aforesaid acts and conduct of defendants, and
18 each of them, constitute unfair and fraudulent business practices
19 and unfair competition and a violation of the rights of plaintiff
20 under the common law and under California Civil Code §3369 and
21 California Business and Professions Code §§14330 and 17500 and
22 defendants are liable to plaintiff therefor.

23 26. Plaintiff is informed and believes and therefore
24 alleges that in engaging in the aforesaid conduct and doing the
25 aforesaid acts defendants acted wilfully, wantonly, maliciously,
26 oppressively and with wanton and wilful disregard of plaintiff's
27 rights and, accordingly, plaintiff is entitled to punitive and
28 exemplary damages in an amount not less than \$5,000,000.

1 WHEREFORE, plaintiff prays for judgment against defen-
2 dants, and each of them as follows:

3 1. That defendants be adjudged to have competed unfairly
4 with plaintiff, engaged in unfair and fraudulent business practices,
5 and used false descriptions, designations and representations in
6 violation of state and federal law.

7 2. That defendants, their officers, directors, agents,
8 servants, employees, representatives, licensees, and corporate
9 parents, subsidiaries and affiliates, and each of them, be enjoined
10 during the pendency of this action, and permanently thereafter,
11 from:

12 (a) Marketing, advertising, selling, distributing,
13 promoting, licensing, exhibiting, or publicly performing
14 "Donkey Kong" or any other products which use, incorpo-
15 rate or feature the name, character or story "King Kong"
16 or "Kong."

17 (b) Unfairly competing with plaintiff in any manner
18 whatsoever.

19 3. For damages in an amount not less than \$1,000,000
20 according to proof adduced at trial;

21 4. That plaintiff be awarded three times the amount of
22 actual damages proved at trial under Counts I and II;

23 5. For punitive damages in an amount not less than
24 \$5,000,000;

25 6. For the profits received by defendants, and each of
26 them, as a result of the acts and conduct of said defendants
27 alleged in this Complaint, and for an accounting from defendants,
28 and each of them, to determine said profits;

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7. For costs of suit, including reasonable attorneys' fees, incurred herein; and

8. For all other relief to which plaintiff is entitled pursuant to Federal Rules of Civil Procedure, Rule 54(c) and Title 15, United States Code.

DATED: June __, 1982.

By _____